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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 94

M. D. HICKLIN, INDIVIDUALLY, ETC.,
RESPONDENT-APPELLANT,

against

J. C. CONEY, EARLE R. ELLERBE, ET AL., AS MEMBERS OF AND CONSTITUTING THE RAILROAD COMMISSION OF SOUTH CAROLINA,
PETITIONERS-APPELLEES.

BRIEF OF APPELLANTS IN REPLY TO APPELLEES' OBJECTIONS TO THE JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

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NATHAN & SINKLER,
Of Counsel.

INDEX.

Subject Index

	Page
As to grounds of objection to jurisdiction	1
As to motion to dismiss or affirm	3

Table of Cases Cited

American Sugar Refining Co. v. State of Louisiana, 179 U. S. 89, 21 S. Ct. 43, 45 L. Ed. 102	2
Clark v. Poor, 274 U. S. 554, 47 S. Ct. 702, 71 L. Ed. 1199	5
Continental Baking Co. v. Woodring, 286 U. S. 352, 52 S. Ct. 595, 76 L. Ed. 816	6
Interstate Transit, Inc. v. Lindsey, 283 U. S. 183, 51 S. Ct. 380, 75 L. Ed. 953	5
Nutt v. Ellerbe, et al., 56 F. (2d.) 1058	3
Smith v. Cahoon, Sheriff, 283 U. S. 555, 51 S. Ct. 582, 75 L. Ed. 1264	3
State ex rel. Coney et al., v. Hicklin, 176 S. E. 674	4

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As to Grounds of Objection to Jurisdiction

It is admitted that the appeal by *Blalock Motor Express, Inc.*, should be dismissed for failure of said appellant to file its appeal bond; and that the fourth assignment of error should be disregarded.

It is respectfully submitted that appellant's Statement as to the Jurisdiction of this Court fully complies with all of the requirements of Sec. 1 of Rule 12.

The basis upon which it must be determined whether the appeal is one properly within the jurisdiction of this Court is divided into three parts: first, whether a Federal question was presented for decision; second, whether its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment of the Court below could not have been rendered without deciding it; and, third, whether the appeal properly lies to this Court.

Apellee's Objections to the Jurisdiction do not run to any one of these questions. The sole purpose of the action was to inquire and determine whether the statute in question was repugnant to Sec. 8 of Art. 1 of the Constitution of the United States and to the Fifth and Fourteenth Amendments thereto. No local or State questions were involved. The constitutionality of the said statute was the only question presented, and this was necessarily a Federal question; this question was decided adversely to appellants by the Supreme Court of South Carolina, and its judgment could not have been rendered without such determination.

It is not even contended by the appellees' that such a question is not presented, but merely that the constitutional questions involved are not stated with sufficient particularity. This objection cannot be sustained, as appellant's assignments of error and statement of points to be relied upon specifically set forth the objectionable sections and portions of the statute, and the particular provisions of the Federal Constitution which each such section or portion violates.

It was said by Mr. Justice Brown in *American Sugar Refining Co. vs. State of Louisiana, et al.*, 179 U. S. 89; 21 S. Ct. 43; 45 L. Ed. 102, in refusing a motion to dismiss:

> "As, however, the protection of the 14th Amendment was invoked in the answer, and, as this defense is at least plausible upon its face, the motion to dismiss must be denied."

The Florida statute which was held to be unconstitutional in *Smith vs. Cahoon*, 283 U. S. 553; 51 S. Ct. 582; 75 L. Ed. 1264, was copied almost verbatim from the South Carolina statute here considered. It would be difficult to prepare a clearer, more forceful or more logical discussion of the questions presented by this appeal than is to be found in the opinion of Judge Cochran in the case of *Nutt vs. Ellerbe*, 56 F. (2d.) 1058, wherein the statute now under consideration was held to be unconstitutional.

It is not even contended that an appeal in the case at bar does not lie to this Court, nor that any procedural or technical questions are involved.

As to Motion to Dismiss or Affirm.

Under this motion appellees seek to argue this case upon its merits, which is manifestly premature and improper.

Appellant earnestly objects to the following statement in the first ground of the motion to affirm. (Page 4.)

> "The record in this case established that farmers and/or dairymen used the highways of the State only seasonally, during the harvest seasons of the year, that is during a few summer months and a few fall months, and that the use made by them is very light and insignificant as compared with the use made by appellant and others in like situation, operating fleets of large and heavy trucks from one end of the State to the other. It was also established that the Railroad Commission, which was charged with the duty of enforcing the Act, construed the exemption as running in favor only of farmers and dairymen whose principal business was farming and dairying and not in favor of farmers or dairymen who made a regular business of transport hauling for others."

There is no factual basis upon which the foregoing statement can be predicated. This Court will be amazed and shocked to learn not only that the appellees did not introduce

any testimony in support of the allegations of their petition, but also that the Supreme Court of South Carolina denied the appellant the right to offer any testimony. Appellant filed demurrers to the petition, but the Court, over appellant's objection, heard argument on the merits at the time when the demurrers were argued, and, before passing on the same, rendered final judgment when the demurrers were over-ruled, without taking any testimony whatever. Inasmuch as the return and answer of the appellant specifically denied the truth of every material allegation of fact in the appellees' petition and reply, thereby putting them in issue, it is apparent that appellant has not had his day in Court, and that any purported finding of fact in the decree is purely an assumption and without any proper foundation.

The Court held, at page 679 (*ex rel. Coney et al., v. Hicklin et al.*, 176 S. E., 674): "We think the respondents have failed to sustain the burden cast upon them of showing beyond a reasonable doubt that the exemption in question renders the Act unconstitutional and invalid."

It is true that in cases where the *plaintiff* attacks the constitutionality of a statute the burden is cast upon him of demonstrating the invalidity of such statute. But, in the case at bar, the appellees, who instituted the action, alleging the validity of the statute, assumed the burden of establishing such validity, and it is, to say the least, a novel proposition of law to hold that the *defendant* in a civil action must establish his defense "beyond a reasonable doubt." In its decree, the Court below merely assumed every allegation of the petition and reply to be true, and every allegation of the return and answer to be false.

The foregoing remarks apply with equal force to the second ground of appellees' motion, wherein it is stated that appellant's objections to the validity of the statute, based upon its provisions relative to (a) cargo insurance, and (b) the duty of the commission to regulate the rates and fares of ap-

pellant and others in like situation, may be disposed of by reason of the fact that there was no showing that the commission had ever undertaken to enforce the said provisions of the Act. It certainly should be sufficient to say that appellant has never been afforded any opportunity to make such showing.

The general rule that the decision of a State Supreme Court construing a state statute will be accepted as final and conclusive is subject to certain exceptions, one of which is that such construction will not be adopted when such statutory provision is alleged to violate a federal statute. There is absolutely nothing in the statute itself to indicate that contract carriers were not required to carry cargo insurance. There is no allegation in the petition or reply to the effect that the commission did not enforce such requirements. This requirement was added to the original Act by an amendment passed at the same session of the legislature which further amended the original Act by making contract carriers subject thereto. These two Acts were adopted within 10 days of each other. The Act provides a penalty by fine or imprisonment for the violation of any of its provisions. As held in *Smith v. Cahoon, supra,* it is improper for the legislature to impose upon a citizen the duty and necessity of determining for himself the valid or invalid provisions of an Act, for the violation of which penal remedies are provided.

As to the third ground of such motion, it is deemed sufficient to say that the Court below completely ignored the rule announced by this Court in the following cases: *Interstate Transit, Inc. v. Lindsey,* 283 U. S., 183; 51 S. Ct., 380; 75 L. Ed., 953, and *Clark v. Poor,* 274 U. S. 554; 47 S. Ct., 702; 71 L. Ed., 1199: which, it is respectfully submitted, has not been either reversed or modified, and which is peculiarly applicable to the South Carolina statute.

Appellees' principal contention is that the case of *Smith v. Cahoon, supra,* has been so modified by the decision of this

Court in *Continental Baking Co. v. Woodring*, 286 U. S., 352; 52 S. Ct., 595; 76 L. Ed., 816, as to be of no further force and effect. The force of this contention, however, is lost upon a careful examination of the differences between the statutes under consideration in these two cases.

In *Continental Baking Co. v. Woodring, supra*, the following language occurs:

> "The distinction in the instant case is of a different sort. The statute does not attempt to impose any arbitrary discrimination between carriers who transport property for hire, or compensation, with respect to the class of products they carry. The exemption runs only to one who is carrying his own livestock and farm products to market or supplies for his own use in his own motor vehicle."

Appellees' principal contention in the Court below was, as appears in the first paragraph of their reply, that the Railroad Commission had uniformly construed the statute in question as exempting farmers and dairymen only when hauling their own products, or only when hauling occasionally, and not as a regular business; and that the commission had adopted and promulgated a formal regulation to that effect since the institution of this action, thereby seeking to bring themselves within the decision in *Continental Baking Co. v. Woodring, supra.* But the Court below refused to adopt such construction in the following language:

> "It will be observed that this conclusion has been reached independently of the construction placed by the Railroad Commission upon the contested provision of the Act. We think that this construction is, in part, unsound. One hauling his own products in his own motor vehicle does not come within the purview of the Act and no provision for this exemption is necessary. The Act applies only to those who are carriers for compensation, and the exemption can refer only to farmers and dairy-

men hauling farm and dairy products for compensation. The same may be said with regard to those hauling lumber and logs from the forest to the shipping points."

Hence, it is readily apparent that the same basis upon which this Court differentiated between the Florida statute and the Kansas statute in the two last cited cases does not apply in the case at bar.

For the foregoing reasons it is respectfully submitted that the appellees' objection to the jurisdiction should be overruled, and that their motion to dismiss the appeal or affirm the judgment should be dismissed.

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